Hong Leong Bank Bhd v Ten Jing Enterprise Sdn Bhd & Ors and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-01(NCVC)(W)-143–03 OF 2023 AND W-01(NCVC)(W)-166–03 OF 2023
NANTHA BALAN, AZHAHARI RAMLI AND AHMAD KAMAL JJCA
4 JUNE 2025

Tort — Negligence — Breach of statutory duty — Public prosecutor issued seizure order to bank under Anti-Money Laundering, Anti-Terrorism Financing Act 2001 ('the AMLA') to freeze monies in current account belonging to TS Steel and later filed proceedings to have the same forfeited — High Court on hearing plaintiff's third-party application as bona fide claimant to seized monies ordered monies to be released to plaintiff — Bank however had released monies to Insolvency Department ('MDI') following winding up of TS Steel — Whether plaintiff had right to sue bank in negligence for causing it to lose the seized monies — Whether AMLA prohibited bank from dealing with seized monies until forfeiture proceedings were over — Whether winding up proceedings against TS Steel were prohibited so long as seizure order was in force — Whether winding up order against TS Steel was void ab initio — Whether seized monies were not assets of TS Steel covered by the winding up order — Whether s 52A of Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 had no application in instant case and could not be applied retrospectively

On 3 January 2013, pursuant to investigations into an alleged customs duties evasion scheme, the second respondent ('R2'), acting on behalf of the third respondent ('R3') issued to Hong Leong Bank Bhd ('HLBB') a freezing order under s 44 of the Anti-Money Laundering, Anti-Terrorism Financing Act 2001 ('the AMLA') to freeze monies ('the seized monies') in a current account belonging to TS Steel Sdn Bhd ('TS Steel'). On 1 April 2013, the public prosecutor ('PP') issued a seizure order under AMLA ordering HLBB not to part with, deal in or otherwise dispose of the seized monies until such time the freezing order was revoked or varied. In March 2014, the PP applied for forfeiture, without prosecution, of the seized monies. Responding to notice of the forfeiture proceedings published in the Government *Gazette*, Ten Jing Enterprise Sdn Bhd ('Ten Jing') filed a third-party application claiming that it was bona fide entitled to the seized monies. The High Court ordered the seized sum of RM1,270,262.15 to be released to Ten Jing. The order was affirmed by the Court of Appeal on 10 October 2018 at which point in time the seized monies were still in the HLBB current account. However, following TS Steel's winding up a month later, HLBB released the seized monies to the Insolvency Department ('MDI') without notifying anyone about its decision/action. Ten

Jing sued HLBB, R2, R3 and the Government of Malaysia ('R4') for negligently causing the seized monies to be released to MDI in breach of the seizure order. HLBB denied liability, arguing that it did not know of the third-party application or the forfeiture proceedings and had merely acted pursuant to the winding up order. HLBB also argued that the seizure order had lapsed under s 52A of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the AMLATFAPUA'). R2 and R3 denied any involvement in or knowledge of the release of the seized monies to MDI and contended that HLBB was solely culpable for releasing the monies when the seizure order was still in force. After a full trial, the High Court ordered HLBB to pay Ten Jing the RM1,270,262.15 with interest at 5%pa calculated from 10 October 2018 until date of full payment plus RM300,000 in costs on a solicitor-client basis. The court dismissed Ten Jing's claims against R2, R3 and R4. The trial court held, inter alia, that s 52A of AMLATFAPUA had no application in the instant case and that the winding up of TS Steel was invalid as the law prohibited the commencement of any civil proceedings in respect of the seized monies so long as the seizure order was in force. HLBB appealed against the whole of the High Court's decision, whilst Ten Jing appealed against the dismissal of its claims against R2, R3 and R4 and also against the awarding of interest from 10 October 2018, contending that interest should commence from 14 May 2015 when its third-party application was allowed.

Held, unanimously dismissing the appeals and affirming the High Court's decision:

(1) Since the seizure order in the instant case was issued before s 52A of AMLATFAPUA came into force on 1 September 2014, the law applicable to the seizure order was as provided in s 56(3) of AMLATFAPUA, namely, that it would expire after 12 months if no forfeiture proceedings had been initiated. Since the public prosecutor had commenced forfeiture proceedings under s 56(1) in March 2014, which was within 12 months from the date of the seizure order, the seizure order did not lapse and HLBB was legally prohibited from dealing with the seized monies when it released them to the MDI on 24 November 2014 (see paras 37–38).

(2) The High Court rightly dismissed HLBB's contention that s 52A of AMLATFAPUA operated retrospectively so as to render the seizure order as expired at the time HLBB released the seized monies to MDI. If s 52A was applied retrospectively, it would cause much absurdity and unfairness and compromise substantive rights. Section 52A was not a procedural provision as contended by HLBB. It imposed a strict time limit on seizure orders and had a substantive impact on the rights and assets of affected parties, including Ten Jing in the present case which suffered loss when HLBB failed to comply with its statutory duty under

A the seizure order. Section 52A did not apply as both the freezing and seizure orders in this case were issued in 2013, well before s 52A came into effect (see paras 27–28, 32–33, 40 & 45).

(3) The commencement of winding-up proceedings against TS Steel on 4 August 2014 after the issuance of the seizure order breached s 54 of AMLATFAPUA and rendered the winding up order against the company void ab initio. A winding up order was to facilitate distribution of the company's assets for the benefit of creditors and contributories. However, assets under forfeiture proceedings under AMLATFAPUA could not be said to belong to the company until determined to the contrary. Upon issuance of the seizure order, the seized monies no longer formed part of the assets of TS Steel and, as such, no longer fell within the purview of the official receiver. HLBB was negligent when it failed to notify the official receiver of the fact that the current account had been subject to a seizure order. HLBB also did not consult with or give notice to R2 or R3 about its decision/action to release the seized monies to MDI (see paras 47–52).

(4) HLBB's excuse that it was not aware of the third-party proceedings was untenable. It was immaterial whether or not HLBB knew of the third-party application in light of the seizure order. The crux of the matter was that HLBB was not allowed to deal with the seized monies as long as the seizure order was in force. The evidence clearly showed that HLBB did not have a proper mechanism in place to ensure that the seized monies were in its safe custody until the disposal of the forfeiture proceedings (see paras 56–57 & 62).

(5) AMLATFAPUA provided mechanisms to preserve a seized asset pending determination by the court of who was its rightful owner — whether the Government by way of forfeiture or a third party by way of a bona fide claim. The preservative mechanisms were designed to protect both the Government and third parties. The High Court was right in holding that Ten Jing had a private right of action against HLBB for causing it loss by unlawfully releasing the seized monies in breach of the seizure order. HLBB was therefore liable to pay the sum to Ten Jing as damages for breach of statutory duty (see paras 64 & 69–70).

(6) Given the amount of time, effort and costs expended by Ten Jing to obtain relief in this matter both before the High Court and the Court of Appeal, the trial court's order that HLBB pay RM300,000 in costs to Ten Jing on a solicitor-client basis was fair and reasonable (see para 73).

(7) The High Court did not err in finding R2 and R3 not negligent. Ten Jing had to pay R2-R4 costs for the dismissal of its suit against them and could not seek indemnity for the same from HLBB. The High Court was also not wrong in ordering interest on the judgment sum to run from

10 October 2018 as that was the date the COA confirmed that the seized monies belonged to Ten Jing (see paras 74–75 & 79–81).

[Bahasa Malaysia summary

Pada 3 Januari 2013, menurut siasatan ke atas skim pengelakan duti kastam, responden kedua ('R2'), yang bertindak bagi pihak responden ketiga ('R3') mengeluarkan perintah pembekuan kepada Hong Leong Bank Bhd ('HLBB') menurut s 44 Akta Pencegahan Pengubahan Wang Haram, Pencegahan Pembiayaan Keganasan 2001 ('APPWHPPK') untuk membekukan wang ('wang yang dirampas') dalam akaun semasa milik TS Steel Sdn Bhd ('TS Steel'). Pada 1 April 2013, Pendakwa Raya ('PR') memberikan perintah sitaan menurut APPWHPPK yang mengarahkan HLBB untuk tidak terlibat, berurusan atau melupuskan wang yang dirampas sehingga perintah pembekuan dibatalkan atau diubah. Pada Mac 2014, PR memohon pelucuthakan tanpa pendakwaan untuk wang yang disita. Menjawab notis prosiding pelucuthakan yang diterbitkan dalam Warta Kerajaan, Ten Jing Enterprise Sdn Bhd ('Ten Jing') memfailkan permohonan pihak ketiga atas alasan bahawa mereka berhak mendapatkan wang yang disita. Mahkamah Tinggi memerintahkan jumlah sitaan sebanyak RM1,270,262.15 dipindahkan kepada Ten Jing. Perintah itu telah dikekalkan oleh Mahkamah Rayuan pada 10 Oktober 2018 yang mana wang yang disita masih berada dalam akaun semasa HLBB. Walau bagaimanapun, berikutan penggulungan TS Steel sebulan kemudian, HLBB menyerahkan wang yang dirampas kepada Jabatan Insolvensi ('JIM') tanpa memberitahu sesiapa mengenai keputusan/tindakannya. Ten Jing menyaman HLBB, R2, R3 dan Kerajaan Malaysia ('R4') atas kecuaian menyebabkan wang yang dirampas diserahkan kepada JIM yang melanggar perintah siitaan. HLBB menafikan liabiliti dengan alasan bahawa mereka tidak mengetahui permohonan pihak ketiga atau prosiding pelucuthakan dan hanya bertindak mengikut perintah penggulungan. HLBB juga berhujah bahawa perintah rampasan itu telah luput di bawah s 52A Akta Pencegahan Pengubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil daripada Aktiviti Haram 2001 ('APPWHPPKDHAH'). R2 dan R3 menafikan sebarang penglibatan atau pengetahuan mengenai pelepasan wang yang dirampas kepada JIM dan menghujahkan bahawa HLBB bersalah sepenuhnya kerana menyerahkan wang itu ketika perintah siitaan masih berkuat kuasa. Selepas perbicaraan penuh, Mahkamah Tinggi memerintahkan HLBB membayar RM1,270,262.15 kepada Ten Jing dengan faedah sebanyak 5% setahun yang dikira dari 10 Oktober 2018 sehingga tarikh pembayaran penuh ditambah kos guaman sebanyak RM300,000. Mahkamah menolak tuntutan Ten Jing terhadap R2, R3 dan R4. Mahkamah perbicaraan memutuskan, antara lain, bahawa s 52A APPWHPPKDHAH tidak boleh digunapakai dalam kes ini dan penggulungan TS Steel adalah tidak sah kerana undang-undang melarang sebarang prosiding sivil dimulakan berkenaan dengan wang yang dirampas selagi perintah sitaan itu berkuat kuasa. HLBB merayu terhadap keseluruhan

keputusan Mahkamah Tinggi, manakala Ten Jing merayu terhadap penolakan tuntutannya terhadap R2, R3 dan R4 dan juga terhadap pemberian faedah mulai 10 Oktober 2018 dengan alasan bahawa faedah harus bermula dari 14 Mei 2015 apabila permohonan pihak ketiganya dibenarkan.

Diputuskan, sebulat suara menolak rayuan-rayuan dan mengekalkan keputusan Mahkamah Tinggi:

(1) Memandangkan perintah sitaan dalam kes ini dikeluarkan sebelum s 52A APPWHPPKDHAH berkuat kuasa pada 1 September 2014, undang-undang yang terpakai kepada perintah sitaan adalah seperti yang diperuntukkan dalam s 56(3) APPWHPPKDHAH, iaitu, bahawa ianya akan tamat tempoh selepas 12 bulan sekiranya tiada prosiding pelucuthakan dimulakan. Memandangkan pendakwa raya telah memulakan prosiding pelucuthakan di bawah s 56(1) pada Mac 2014, iaitu dalam tempoh 12 bulan dari tarikh perintah sitaan, perintah sitaan tersebut tidak luput dan HLBB dilarang secara sah daripada berurusan dengan wang yang disita apabila mereka menyerahkan wang tersebut kepada MDI pada 24 November 2014 (lihat perenggan 37–38).

(2) Mahkamah Tinggi dengan betul menolak hujahan HLBB bahawa s 52A APPWHPPKDHAH beroperasi secara retrospektif dengan mengatakan bahawa perintah sitaan telah tamat tempoh ketika HLBB melepaskan wang yang disita kepada MDI. Sekiranya s 52A digunakan secara retrospektif, ianya akan menyebabkan banyak tindakan yang tidak masuk akal dan menyebabkan ketidakadilan serta menjejaskan hak substantif. Seksyen 52A bukanlah peruntukan prosedur seperti yang dihujahkan oleh HLBB. Ianya adalah untuk meletakkan had masa yang ketat ke atas perintah sitaan dan mempunyai kesan substantif ke atas hak dan aset pihak yang terjejas, termasuk Ten Jing dalam kes ini yang mengalami kerugian apabila HLBB gagal mematuhi kewajipan statutorinya di bawah perintah sitaan. Seksyen 52A tidak terpakai kerana kedua-dua perintah pembekuan dan sitaan dalam kes ini diberikan pada tahun 2013, jauh sebelum s 52A berkuat kuasa (lihat perenggan 27–28, 32–33, 40 & 45).

(3) Permulaan prosiding penggulungan terhadap TS Steel pada 4 Ogos 2014 selepas pengeluaran perintah sitaan melanggar s 54 APPWHPPKDHAH dan menjadikan perintah penggulungan terhadap syarikat itu tidak sah secara ab initio. Perintah penggulungan adalah untuk memudahkan pengagihan aset syarikat untuk kepentingan pemiutang dan pencarum. Walau bagaimanapun, aset di bawah prosiding pelucuthakan di bawah APPWHPPKDHAH tidak boleh dikatakan milik syarikat sehingga ditentukan sebaliknya. Setelah perintah sitaan dikeluarkan, wang yang disita tidak lagi menjadi sebahagian daripada aset TS Steel. Oleh itu, ianya tidak lagi berada dalam bidang kuasa pegawai penerima. HLBB

telah melakukan kecuaian apabila gagal memaklumkan kepada pegawai penerima bahawa akaun semasa telah tertakluk kepada perintah sitaan. HLBB juga tidak berunding atau memberi notis kepada R2 atau R3 mengenai keputusan/tindakannya untuk menyerahkan wang yang disita kepada JIM (lihat perenggan 47–52).

(4) Alasan HLBB bahawa mereka tidak menyedari terdapat prosiding pihak ketiga tidak dapat dipertahankan. Adalah tidak penting sama ada HLBB mengetahui permohonan pihak ketiga atau tidak memandangkan terdapat perintah sitaan. Intipati perkara itu ialah HLBB tidak dibenarkan berurusan dengan wang yang disita selagi perintah sitaan berkuat kuasa. Keterangan jelas menunjukkan bahawa HLBB tidak mempunyai mekanisme yang betul untuk memastikan bahawa wang yang disita berada dalam jagaan selamat sehingga pelupusan prosiding pelucuthakan (lihat perenggan 56–57 & 62).

(5) APPWHPPKDHAH menyediakan mekanisme untuk memelihara aset yang disita sementara menunggu penentuan oleh Mahkamah berkenaan pemilik sahnya — sama ada Kerajaan melalui pelucuthakan atau pihak ketiga melalui tuntutan bona fide. Mekanisme tersebut dibuat untuk melindungi kedua-dua Kerajaan dan pihak ketiga. Mahkamah Tinggi betul dalam memutuskan bahawa Ten Jing mempunyai hak persendirian untuk bertindak terhadap HLBB kerana menyebabkan kerugian dengan menyerahkan wang yang disita secara tidak sah yang melanggar perintah sitaan. Oleh itu, HLBB bertanggungjawab untuk membayar jumlah itu kepada Ten Jing sebagai ganti rugi kerana melanggar kewajipan statutorinya (lihat perenggan 64 & 69–70).

(6) Memandangkan jumlah masa, usaha dan kos yang dibelanjakan oleh Ten Jing untuk mendapatkan relif dalam perkara ini di hadapan Mahkamah Tinggi dan Mahkamah Rayuan, perintah mahkamah perbicaraan bahawa HLBB membayar kos guaman sebanyak RM300,000 kepada Ten Jing adalah adil dan munasabah (lihat perenggan 73).

(7) Mahkamah Tinggi tidak terkhilaf ketika memutuskan R2 dan R3 tidak melakukan kecuaian. Ten Jing harus membayar kos R2-R4 untuk samannya yang ditolak terhadap mereka dan tidak boleh mendapatkan ganti rugi untuk perkara tersebut daripada HLBB. Mahkamah Tinggi juga tidak terkhilaf ketika memerintahkan faedah ke atas jumlah penghakiman bermula 10 Oktober 2018 kerana itu adalah tarikh MR mengesahkan bahawa wang yang disita adalah milik Ten Jing (lihat perenggan 74–75 & 79–81).]

Cases referred to

Ireka Engineering & Construction Sdn Bhd v PWC Corp Sdn Bhd and other appeals [2020] 1 MLJ 311; [2020] 1 CLJ 193; [2019] 6 MLRA 1, FC (refd)

Lim Hui Jin v CIMB Bank Bhd & Ors [2018] 6 MLJ 724; [2018] 8 CLJ

A 327; [2018] 5 MLRA 59; [2018] 5 AMR 775, CA (distd)
Tenaga Nasional Bhd v Kamarstone Sdn Bhd [2014] 2 MLJ 749; [2014] 1 MLRA 105; [2014] 1 AMR 522; [2014] 1 CLJ 207, FC (refd)
Tey Kian Meng v Sierra Residences (M) Sdn Bhd & Anor [2024] MLJU 3124; [2024] CLJU 2631; [2024] AMEJ 2674, HC (refd)

B **Legislation referred to**

Anti-Money Laundering, Anti-Terrorism Financing Act 2001 ss 44, 44(1), (5), 50(1), 56, 61, 61(2)
C Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ss 50, 50(2), 52A, 53(3), 54, 55, 56, 56(1), (3), 77

Appeal from: *Ten Jing Enterprise Sdn Bhd lwn Hong Leong Bank Bhd dan lain-lain* [2021] MLJU 449

D *Lee Foong Voon Karen (with Ho Zhi Yee) (Wong Kian Kheong) in Civil Appeal No W-01(NCVC)(W)-143–03 of 2023 for the appellant.*
V Jeya Kumar (with Kee Hui Yee and Jowyn Saw) (Kanesalingam & Co) in Civil Appeal No W-01(NCVC)(W)-143–03 of 2023 for the first respondent.
E *Siti Aishah bt Ramlan (with Siti Syakimah bt Ibrahim) (Attorney General's Chambers) in Civil Appeal No W-01(NCVC)(W)-143–03 of 2023 for the second and fourth respondents.*
V Jeya Kumar (with Kee Hui Yee and Jowyn Saw) (Kanesalingam & Co) in Civil Appeal No W-01(NCVC)(W)-166–03 of 2023 for the appellant.
F *Lee Foong Voon Karen (with Ho Zhi Yee) (Wong Kian Kheong) in Civil Appeal No W-01(NCVC)(W)-166–03 of 2023 for the first respondent.*
Siti Aishah bt Ramlan (with Siti Syakimah bt Ibrahim) (Attorney General's Chambers) in Civil Appeal No W-01(NCVC)(W)-166–03 of 2023 for the second and fourth respondents.

G **Ahmad Kamal JCA:**

INTRODUCTION

H **[1]** These two appeals emanate from a High Court decision dated 27 February 2023. The first appeal, ie, Appeal W-01(NCvC)(W)-143–03 of 2023 ('Appeal 143') is an appeal by Hong Leong Bank Bhd ('first defendant'), who is dissatisfied with the whole of the decision of the learned judicial commissioner ('JC') in making the order that the first defendant is to pay a sum
I of RM1,270,262.15 ('said sum') with interest of 5%pa from 10 October 2018 until full settlement to Ten Jing Enterprise Sdn Bhd ('the plaintiff'), and also in her finding that the plaintiff's claim against Engku Hanif bin Engku Ismail ('second defendant'), Ketua Pengarah Jabatan Kastam Diraja Malaysia ('third defendant'), and Kerajaan Malaysia ('fourth defendant') is dismissed.

[2] The second appeal, ie, Appeal W-01(NCVC)(W)-166–03 of 2023 ('Appeal 166'), is an appeal by the plaintiff against part of the decision of the learned JC in respect of her decision that:

(a) the 5% interest on the said sum, that is to be paid by the first defendant to the plaintiff, is to be calculated from 10 October 2018, ie, the date of the Court of Appeal (COA) in Criminal Appeal No: W-05–239–06 of 2017 ('Appeal 239'), until full settlement; and

(b) the plaintiff's claim against the second to fourth defendants is dismissed.

[3] We heard both appeals on 5 March 2025 and, after carefully deliberating the records of appeal and considering submissions by both parties, we have unanimously decided to dismiss both appeals. This judgment provides the reasons for our decision to dismiss both appeals.

BACKGROUND FACTS

[4] Pursuant to an investigation of an alleged customs duties evasion scheme involving one TS Steel Sdn Bhd ('TS Steel') and others, on 3 January 2013, the second defendant, an officer of the third defendant who carried out the investigation, had issued a freezing order under s 44 of the Anti-Money Laundering, Anti-Terrorism Financing Act 2001 ('the AMLATFA') ('freezing order') to freeze a bank account of TS Steel maintained at the first defendant. The freezing order was in respect of TS Steel's current bank account number 21300003706 ('the current account'). This was part of the efforts to preserve the assets under the direction of the third defendant. The freezing order was valid for 90 days as per s 44(5) of the AMLATFA.

[5] On 1 April 2013, before the expiry of the 90 days, the public prosecutor had issued a seizure order ('seizure order') to order the first defendant 'not to part with, deal in, or otherwise dispose of such property or any part of it until this order otherwise revoked or varied'. The seizure order was issued under s 50(1) of the AMLATFA.

[6] In March 2014, the public prosecutor commenced a forfeiture application to forfeit, without prosecution, several bank accounts involved in the alleged customs duty evasion scheme, including the current account. For the forfeiture proceedings under s 56 of the AMLATFA, confirmation was obtained from the first defendant regarding the amount which was in the current account.

[7] On 1 September 2014, s 52A of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the AMLATFAPUA') came into force which provides that when there is no

prosecution against the party whom the seizure order was issued, its expiry would be 12 months from its issuance or if there was a prior freezing order, then twelve months from the issuance of that order.

THE THIRD-PARTY APPLICATION

[8] On 22 September 2014, a Federal Government *Gazette* was issued under s 61(2) of the AMLATFA, notifying the public who deemed themselves to have an interest in the frozen and seized assets to apply to the court to claim the same as bona fide third parties. This is where the plaintiff became involved in the factual matrix. In this regard, on 20 October 2014, the plaintiff filed a third-party application in the High Court, claiming an interest in the current account for the sum of RM1,270,262.15, ie, the said sum.

[9] On 14 May 2015, the High Court granted an order in favour of the plaintiff and ordered that the said sum be released to the plaintiff. The High Court ruled that s 52A of the AMLATFAPUA does not have a retrospective effect on seizure orders prior to its effective date.

[10] On 23 April 2016, in the appeal by the public prosecutor against the High Court's order dated 14 May 2015, the COA remitted the matter to the High Court for viva voce evidence. The public prosecutor confirmed that the said sum was still in the current account. The second defendant repeated this confirmation at the trial in the High Court.

[11] On 24 May 2017, after assessing all the evidence, the High Court allowed the plaintiff's bona fide third-party application under s 61 of the AMLATFA and ordered the said sum in the current account to be released to the plaintiff ('24 May 2017 order').

[12] On 10 October 2018, vide Criminal Appeal No: W-05–239–06 of 2017 ('Appeal 239'), the COA dismissed the public prosecutor's appeal against the 24 May 2017 order. The public prosecutor again confirmed that the said sum was still in the current account. There was no further appeal. At the conclusion of the proceedings it was clear that said sum in the current account rightfully belonged to the plaintiff.

[13] Pursuant to the COA order in Appeal 239, the plaintiff initiated several attempts to recover the said sum. However, only three months later, on 23 January 2019, the first defendant informed the plaintiff that the said sum had been released to the Malaysian Department of Insolvency ('MDI') following the winding up of TS Steel on 20 November 2014.

IN THE HIGH COURT

[14] The plaintiff filed a civil suit WA-21NCVC-81–11 of 2019 in the High Court ('the present suit'), armed with the COA's order that confirmed it was a bona fide third party and entitled to the said sum in the current account.

[15] The plaintiff's pleaded case was that the first defendant was negligent in not abiding by the seizure order under AMLATFA. By releasing the said sum to the MDI before the conclusion of the forfeiture proceedings, the first defendant caused the plaintiff to lose the said sum to which it was entitled.

[16] The plaintiff sued the second and third defendants for negligence in failing to ensure that the said sum was preserved by the first defendant throughout the forfeiture proceedings, which had ruled in the plaintiff's favour. As against the fourth defendant, the plaintiff claimed that it was vicariously liable for the negligence of the second and third defendants.

THE DEFENCE

[17] In its defence, the first defendant contended that the seizure order was no longer effective when it remitted the said sum to the MDI according to AMLATFAPUA. The first defendant's position was that s 52A of the AMLATFAPUA applied retrospectively to seizure orders issued prior to its effective date. Further, the first defendant argued that in any event, no private law duties arose from the alleged statutory breach.

[18] The second and third defendants' defence was that it was the first defendant's duty to abide by and comply with the seizure order. The forfeiture proceedings under s 56 of the AMLATFAPUA were initiated prior to the expiry of the seizure order. Therefore, it was still in force. They also took the position that s 52A of the AMLATFAPUA has no retrospective effect.

FINDINGS OF THE LEARNED JUDICIAL COMMISSIONER ('JC')

[19] After a full trial, on 27 February 2023, the learned JC allowed the plaintiff's claim against the first defendant and ordered the first defendant to pay to the plaintiff the said sum with interest of 5%pa calculated from 10 October 2018 ie, the date of the decision of the COA in Appeal 239, and costs on client-solicitor basis of RM300,000 subject to allocator.

[20] However, the plaintiff's claim against the second to fourth defendants was dismissed with global costs of RM50,000 to the second to fourth defendants, subject to allocator.

[21] In finding so, the learned JC found:

Whether there was negligence by the first defendant:

(a) throughout the whole time, the said sum remained in the current account with the first defendant. The second and third defendants did not physically seize it. Thus, the first defendant had custody, care, and control of the current account. The first defendant was served with both the freezing order and seizure order that prohibited any dealings with the current account. The first defendant's confirmation and/or representation on the final figure that remained in the current account was also given for initiating the forfeiture proceedings;

(b) no documents were adduced or made available to the court for its consideration in assessing whether the first defendant had complied with procedures and was not negligent in the non-compliance with the seizure order;

(c) Nasrol bin Yatim ('DW2'), the customer service and operation manager of the first defendant, testified that the officers in charge of the current account at the material time could provide evidence on the closure of the said current account and the imposition of the freezing order and seizure order on it. Since the relevant officers of the first defendant were not called to testify, the learned JC exercised her discretion to invoke s 114, Illustration (g) of the Evidence Act 1950 and drew an adverse inference against the first defendant;

(d) no documents were produced to show the standard operating procedure, particularly concerning AMLATFA, at the materialtime. Thus, the first defendant had not discharged its evidential burden when it contended in its defence that it had acted according to the best practice and standard operating procedure ('SOP') of the first defendant concerning the seized property;

(e) the first defendant's argument of having no knowledge of the forfeiture proceedings was unacceptable. The first defendant had represented and confirmed the amount in the current account for the purposes of the forfeiture proceedings. The second defendant confirmed that he had verified with the first defendant, through the compliance unit of the first defendant, prior to the commencement of the forfeiture proceedings, that the amount was still there;

(f) when the forfeiture proceeding was remitted to the High Court as directed by the COA to be heard viva voce, his testimony was based on the confirmation by the first defendant given at the commencement of the suit. The undisputed fact was that the first defendant did not seek advice or permission, nor did it inform the second and third defendants that it had remitted the said sum to the MDI;

(g) as such the plaintiff became clothed with a private right when the first defendant had breached its statutory duty in failing to comply with the seizure order. The High Court found that the first defendant's breach of

the statutory duty caused direct harm to the Government (if the forfeiture proceeding was successful), or to TS Steel or any other bona fide third party. In the result, the harm to the plaintiff cannot be said to be too remote or unforeseeable;

(h) the first defendant was not in compliance with the seizure order when it closed the current account and remitted the said sum to the MDI on 20 November 2014 — a result of the negligence of the first defendant;

(i) the service of both the freezing order and seizure order on the first defendant, though admittedly received, was not recorded anywhere in its system or records. The first defendant owed a duty of care to administer all the current accounts maintained with it properly in accordance with the law. The law applicable here is AMLATFA, whereby compliance with the seizure order is mandatory where the forfeiture proceedings commenced in March 2014;

(j) the second defendant had carried out his duty for and on behalf of the third defendant in ascertaining the final figure in the current account for purposes of the forfeiture proceedings initiated by the public prosecutor. The second defendant had testified that he had communicated with the first defendant prior to the forfeiture proceedings to obtain the final figure in the seized account. The figure obtained was RM1,270,262.15. The communication was done via Bank Negara Malaysia;

(k) the forfeiture proceeding was premised on the final figure represented by the first defendant. So, the first defendant's contention that they were unaware that the forfeiture proceeding had commenced was unacceptable;

(l) in essence, the first defendant's argument that it did not know the plaintiff's bona fide claim and the COA's order until 14 December 2018, following the letter signed by the second defendant, is untenable and, at the very least, immaterial. The first defendant should not have breached the seizure order by closing the current account and remitting the said money to the MDI while the proceedings were ongoing; and

(m) the first defendant owed a duty to comply with the applicable laws when handling the accounts maintained with it. Due to the first defendant's negligence in complying with the seizure order, the plaintiff suffered losses of RM1,270,262.15.

Was the seizure order still valid and effective when the first defendant released the said sum to the MDI?

(a) the first defendant's defence was that the seizure order had lapsed when it released the said sum to the MDI on 24 November 2014;

(b) the court found that there is no intention for s 52A to be applied retrospectively. The High Court opined that the first defendant's interpretation would give rise to an absurdity because if s 52A were to be applied retrospectively, it meant that the expiry of the seizure order would

A be calculated twelve months after the freezing order, which would be 3 January 2014 — eight months before s 52A itself came into force;

(c) the absurdity wouid also lead to considerable unfairness regarding the rights and obligations of many parties involved. In the present case the freezing and seizure orders were issued before the amendment and insertion of s 52A. The High Court found that the case of *Lim Hui Jin v CIMB Bank Bhd & Ors* [2018] 6 MLJ 724; [2018] 8 CLJ 327; [2018] 5 MLRA 59; [2018] 5 AMR 775 as decided by the COA was distinguishable as the facts of that case were different from the present case. In the present case, the seizure order was issued in the calendar year prior to s 52A, a good 17 months, and following that, the forfeiture proceedings were more than half a year before the coming into force of s 52A. (See para [41] below for our discussion on *Lim Hui Jin's* case) Thus, in the present case, the first defendant cannot rely on s 52A as a defence when it closed the current account and remitted the said sum to the MDI on 20 November 2014; and

(d) The law, specifically s 54(3) of the AMLATFA, is clear that for so long as the seizure order remained in force (and here the court holds it so as the forfeiture proceedings had commenced), no other action/suit/other civil proceedings shall be instituted or where it was pending before the seizure order, maintained or continued in respect of the said sum in the said account with the first defendant. The winding up petition of TS Steel, issued on 4 August 2014, followed the issuance of the seizure order and the commencement of forfeiture proceedings. So, it did not prevail or override the legal actions under AMLATFA.

Defence of private cause of action not pleaded

(a) the COA had ordered the release of the said sum in the current account to the plaintiff. The plaintiff sought a remedy over the alleged misconduct by the first defendant and the second to fourth defendants, in the nature of negligence, when the statutory duty/obligation (the seizure order) was breached; and

(b) on a balance of probabilities, there was negligence on the part of the first defendant that resulted in the breach and noncompliance of the seizure order. That, in turn, directly caused loss and damage to the plaintiff.

Whether there was negligence by the second and third defendant*s*

(a) once the seizure order was issued, the first defendant was not to deal with the said sum until the seizure order was varied or revoked. More so when the forfeiture proceedings commenced, where the first defendant's confirmation as to the final figure in the current account was obtained for the purposes of the forfeiture proceedings. All this was before the release of the said sum from the current account to the MDI;

(b) therefore, the confirmation by the second defendant for the third defendant that the said sum was still in the account during the trial/hearing of the forfeiture proceedings and the appeals at the COA was

based on the representation made by the first defendant on the final figure for the commencement of the forfeiture proceedings. The said representation was relied upon when the second defendant testified in the forfeiture proceedings, which was a few months after the representation was made;

(c) following the COA's decision in October 2018, the second defendant, on behalf of the third defendant, had directed the first defendant to release the said sum to the plaintiff. There was no evidence of bad faith or negligence by the second and third defendants in any of their actions; and

(d) there was no negligence in executing his duties as the investigating officer for the third defendant. There was also no breach of statutory duty by him and the third defendant. Accordingly, the action against the fourth defendant cannot be sustained. Thus, the plaintiff's suit against the second to the fourth defendants was dismissed.

THE APPEALS

[22] In Appeal 143, the first defendant submits (as per written submission in encl 11) that:

(a) the first defendant does not owe a duty of care to the plaintiff;

(b) chain of causation was not established;

(c) the plaintiff failed to mitigate its losses;

(d) the seizure order had lapsed when the said sum was transferred to the MDI;

(e) AMLATFAPUA and/or AMLA do not confer upon the plaintiff with a private cause of action nor remedy for breach of any of the provisions under AMLATFAPUA and/or AMLA; and

(f) the costs of RM300,000 ordered to be paid to the plaintiff is punitive in nature.

[23] In Appeal 166, vide encl 11, the plaintiff submits:

(a) even if s 52A AMLATFAPUA applied retrospectively, ie, the seizure order already lapsed when the first defendant released the said sum, the second to fourth defendants ought to be held liable as they failed to issue a fresh seizure order to preserve the said sum which belonged to the plaintiff;

(b) the interest awarded against the first defendant should be calculated from 14 May 2015. This is because the first defendant's liability to pay interest on the said sum crystallised when the High Court allowed the plaintiff's third-party application on 14 May 2015; and

(c) in the event this court agrees with the High Court that the second to fourth defendants were not negligent, the costs ordered against the plaintiff ought to be indemnified by the first defendant, as it was necessary for the plaintiff to file this suit and name the second to fourth defendants as parties to the suit.

OUR FINDINGS

Whether s 52A of the AMLATFAPUA applies prospectively and the seizure order was still in force when the first defendant released the said sum to the MDI

[24] Section 52A was inserted into the AMLATFAPUA vide Act A1467, which came into effect on 1 September 2014 vide PU(B) 400/2014 dated 8 August 2014 ('the Amendment Act').

[25] The said s 52A provides:

> *Expiry of seizure order*
>
> A seizure order made under this Act shall cease to have effect *after the expiration of twelve months from the date of the seizure order, or where there is a prior freezing order, twelve months from the date of the freezing order*, if the person against whom the order was made has not been charged with an offence under this Act. (Emphasis added.)

[26] The first defendant argued that s 52A should apply retrospectively as it is procedural in nature and is intended to protect the rights of the persons affected by the seizure orders.

[27] The first defendant further contended that relying on s 52A of the AMLATFAPUA, the seizure order issued by the public prosecutor on 1 April 2013 was only valid for 12 months. Hence, the first defendant was not in breach of its statutory duty when it released the said sum to the MDI.

[28] Having read s 52A of the AMLATFAPUA, we are of the considered view that the said section does not apply retrospectively. This is because the new provision s 52A only came into force on 1 September 2014, which was about seven months after the seizure order expired. If the new provision were to be applied retrospectively, it would cause much absurdity and unfairness.

[29] We find that neither the Amendment Act nor AMLATFAPUA provides for retrospective application against seizure orders issued before s 52A came into force.

[30] Pursuant to the preamble of the Amendment Act, we find that it is expressly stated that, except for ss 22 and 26 of the Amendment Act, the rest of the sections came into force from 1 September 2014.

[31] Hence, we are of the view that the newly inserted s 52A does not apply to the seizure order, which was issued 17 months before the coming into force of s 52A.

[32] Furthermore, we find that s 52A is obviously not a procedural provision as it imposes a strict time limit on seizure orders and has a substantive impact on the rights and assets of affected parties, including the plaintiff in the present case. In particular, by failing to comply with the seizure order when it released the said sum to the MDI, the first defendant breached its statutory duty, resulting in the plaintiff suffering losses.

[33] The well-entrenched principle of law is that regardless of whether a provision is procedural or substantive, it cannot be applied retrospectively if a substantive right is compromised. This principle may be gleaned from the following cases.

[34] In *Tenaga Nasional Bhd v Kamarstone Sdn Bhd* [2014] 2 MLJ 749; [2014] 1 MLRA 105; [2014] 1 AMR 522; [2014] 1 CLJ 207, the Federal Court held as follows:

> [5] Before us, learned counsel for the appellant submitted that both leave questions should be answered in the negative. Learned counsel for the respondent agreed that reg 11(2), post amendment, had no retrospective effect. It would seem that both parties knew what should be the answer to the first leave question, which should free us to proceed to the next leave question. Still, *we could take this opportunity to uphold that it is indeed a rule of construction that a statute should not be interpreted retrospectively to impair an existing right or obligation, unless such a result is unavoidable by reason of the language used in the statute* (*Yew Bon Tew & Anor v Kenderaan Bas Mara* [1983] 1 MLJ 1; [1983] 1 CLJ 11; [1983] CLJ Rep 56 per Lord Brightman, delivering the advice of the board).
>
> [6] In *National Land Finance Co-Operative Society Ltd v Director General Of Inland Revenue* [1994] 1 MLJ 99; [1993] 4 CLJ 339, Gunn Chit Tuan CJ (Malaya) said:
>
> > *On the retrospective operation of Acts, the presumption is that an enactment is not intended to have a retrospective operation unless a contrary intention appears*. In this case, that presumption has been rebutted because s 1(5) of the Amendment Act states in clear terms that the amendment was intended to be retrospective, But *a retrospective operation should not be given to a statute to impair an existing right* and it has been stated by the UK Court of Appeal in *EWP Ltd v Moore* [1992] 1 All ER 880 at p 891:
> >
> > > ... that those who have arranged their affairs, as the saying is, in reliance on a decision of these courts which has stood for many years should not find

A that their plans have been retrospectively upset...

Moreover, one should avoid a construction that inflicts a detriment and as Lord Brightman has said in *Yew Bon Tew & Anor v Kenderaan Bas Mara* [1983] 1 MLJ 1; [1983] 1 CLJ 11; [1983] CLJ Rep 56 at p 2:

B A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already past.

[7] *If it takes away a substantive right, the amendment will not have retrospective effect, save by clear and express words. If it is procedural, retrospectivity applies unless otherwise* C *stated in the statute concerned* (*MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 2 MLJ 673; [2002] 3 CLJ 577 per Steve Shim CJ (Sabah & Sarawak). *If the Legislature intends an amendment to have retrospective application, it must expressly and clearly say so* (see*Puncakdana Sdn Bhd v Tribunal for Housebuyers Claims and another application* [2003] 4 MLJ 9; [2003] 7 CLJ 350 per Md Raus J, as he then D was). But retrospective effect was not manifested in the language of the amendment, Hence, the amendment to reg 11(2) must be constructed as a prospective provision without any retrospective application. (Emphasis added.)

E **[35]** The Federal Court in the case of *Ireka Engineering & Construction Sdn Bhd v PWC Corp Sdn Bhd and other appeals* [2020] 1 MLJ 311; [2020] 1 CLJ 193; [2019] 6 MLRA 1 held as follows:

[43] *There is at common law a prima facie rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that* F *result is unavoidable on the language used, or unless a contrary intention appears* (*Yew Bon Tew & Anor v Kenderaan Bas Mara* [1983] 1 MLJ 1; [1983] 1 CLJ 11; [1983] CLJ Rep 56; *Tenaga Nasional Bhd v Kamarstone Sdn Bhd* [2014] 2 MLJ 749; [2014] 1 MLRA 105; [2014] 1 AMR 522; [2014] 1 CLJ 207). *In other words, there is, so to speak, a presumption that legislation speaks only as to the future* (*West v Gwynne* [1911] 2 Ch 1).

G [44] As a necessary reminder, lest we forget, in construing a statute, *it is also relevant to consider our own interpretation statute namely Act 388 in particular sub-s 19(1) which provides*:

H 19.1(1) *The commencement of an Act or subsidiary legislation shall be the date provided in or under the Act or subsidiary legislation or, where no date is so provided, the date immediately following the date of its publication in pursuance of section 18*. (Emphasis added.)

[36] Further, the Federal Court said as follows:

I [69] ...

But these expressions 'retrospective' and 'procedural', though useful in a particular context, are equivocal and therefore can be misleading. A statute which is retrospective in relation to one aspect of a case (eg because it applies to a pre-statute cause of action) may at the same time be prospective in relation to another aspect of

the same case (eg because it applies only to the post-statute commencement of proceedings to enforce that cause of action); and an Act which is procedural in one sense may in particular circumstances do far more that regulate the course of proceedings, because it may, on one interpretation, revive or destroy the cause of action itself.

...

Whether a statute is to be construed in a retrospective sense, and if so to what extent, depends on the intention of the legislature as expressed in the wording of the statute, having regard to the normal canons of construction and to the relevant provisions of any interpretation statute.

...

Their Lordships consider that the proper approach to the construction of the Act of 1974 is not to decide what label to apply to it, procedural or otherwise but to see whether the statute, if applied retrospectively to a particular type of case, would impair existing rights and obligations.

...

[71] From the above authorities, it is clear to us that *in the absence of express words to such effect, a statute, notwithstanding whether it is procedural or substantive, cannot be applied retrospectively to impair a substantive right.* This settled legal position, we would say, accords well with and further amplifies those statutory provisions of the interpretation statute namely Act 388. To reiterate our point, what is important to note is that the CIPAA in itself does not contain any provision stating that it has retrospective application, Parliament therefore clearly does not exercise its legislative power pursuant to art 66 cl (5) of the Federal Constitution and sub-ss 2(3), 19(1) and 43(a) of Act 388 to enact the CIPAA with retrospective effect. (Emphasis added.)

[37] Given the aforesaid, we find that in the instant case, as the seizure order was issued before the Amendment Act came into force, the law applicable to the seizure order issued in 2013 is that it will only expire after 12 months if there had been no forfeiture proceedings being initiated. This is provided under s 56(3) of the AMLATFAPUA.

Forfeiture of property where there is no prosecution

[3] Any property that has been seized and *in respect of which no application is made under subsection (1)* shall, *at the expiration of twelve months from the date of its seizure, be released to the person from whom it was seized*. (Emphasis added.)

[38] We are of the view that since the public prosecutor had commenced forfeiture proceedings pursuant to s 56(1) of the AMLATFAPUA in March 2014, which was within 12 months from the date of the seizure order, the seizure order did not lapse. The first defendant was still legally prohibited from dealing with the seized account when it released the said sum in the seized account on 24 November 2014.

[39] The seizure order only ceases to have effect until and unless it is revoked, in which case the second defendant has confirmed that no such revocation has been issued.

[40] Therefore, we see no reason to disturb the findings of the learned JC when Her Ladyship ruled that s 52A of the AMLATFAPUA does not apply retrospectively as follows:

> [50] *The insertion of the s 52A after the forfeiture proceedings commenced, is not retrospective and does not apply to seizure orders issued before the said law came into force*. This court agreed with the submissions by the plaintiff on the *general rule is as per the maxim Lex prospicit non respicit — the law does not look back. Unless it is expressly provided in the statute that the said law does*. The Federal Court's decision in *Tenaga Nasional Bhd v Kamarstone Sdn Bhd* [2014] 2 MLJ 749; [2014] 1 MLRA 105; [2014] 1 AMR 522; [2014] 1 CLJ 207 FC took this position as stated at p 216 (CLJ) p755 MLJ:
>
> [51] The learned senior federal counsel for the second to fourth defendants had also cited the decision by the Federal Court in *Ireka Engineering & Construction Sdn Bhd v PWC Corp Sdn Bhd and other appeals* [2020] 1 MLJ 311; [2020] 1 CLJ 193; [2019] 6 MLRA 1 that decided in *construing a statute*, s 19(1) Interpretation Acts 1948 and 1967 (Act 288) has relevance and *application in that a particular law shall commence and take effect as the date provided for by/in the Act or where no date is so provided, the date immediately following the date of its publication*.
>
> [52] This court has considered all the authorities cited by all parties and found that *there is no intention for s 52A to be applied retrospectively. This deduction is absurd because if s 52A was to be applied retrospectively, it meant that the expiry of the seizure order would be calculated twelve months after the freeze order which would be 3 January 2014 — eight months before s 52A itself came into force.*
>
> [53] *The absurdity would also cause much unfairness concerning rights and obligations of many parties involved.* The freeze and seizure orders were issued prior to the amendment and insertion of s 52A so the facts of the case in *Lim Hui Jin v CIMB Bank Bhd & Ors* [2018] 6 MLJ 724; [2018] 8 CLJ 327; [2018] 5 MLRA 59; [2018] 5 AMR 775 decided by the Court of Appeal are distinguished. *The seizure order was issued the calendar year prior to s 52A, a good seventeen months and following that the forfeiture proceedings was more than half a year before the coming into force of s 52A. The first defendant cannot rely on s 52A as defence when it closed the said current account and remitted the said sum to the Department of Insolvency on 20 November 2014.*
>
> [54] The law, *specifically s 54(3) of the AMLATFA is clear that for so long as the seizure order remained in force (and here the court holds it so as the Forfeiture Proceedings had commenced), no other action/suit/other civil proceedings shall be instituted or where it was pending before the seizure order, maintained or continued in respect of the said sum in the said account with the first defendant. The winding-up petition of TS Steel Sdn Bhd on 4 August 2014 was after the issuance of the seizure order and the commencement of the forfeiture proceedings. So, it did not prevail or override the legal actions under AMLATFA.* (Emphasis added.)

[41] We now turn to the argument by the first defendant that the decision of the COA in the case of *Lim Hui Jin* applies and binds this court for the purposes of this case.

[42] The brief facts of *Lim Hui Jin* are as follows:

(a) pursuant to a freezing order under s 44(1) of the AMLATFA, Lim Hui Jin's CIMB Account No 25164 was frozen with effect from 24 June 2014;

(b) para 3 of the said freezing order stated that the order was valid for 90 days, pursuant to s 44(5);

(c) the said freezing order would cease to have effect on 21 September 2014, if Lim Hui Jin was not charged with an offence under the AMLATFA;

(d) on 11 September 2014, a seizure order under s 50(1) of the AMLATFA was issued against Lim Hui Jin's account;

(e) the basis of the said seizure order was that the money in the said Lim Hui Jin's account are subject matter of an offence under s 4(1) of the AMLATFA allegedly committed by Lim Hui Jin's mother, Tan Hoo Eng, the applicant in the case;

[43] The main finding by the COA in that case was that, firstly, as the seizure order was issued on 11 September 2014, ten days after the amendments to AMLATFA came into effect, the said seizure order was governed by the new s 52A. Therein lies the stark difference between the facts of *Lim Hui Jin's* case and the present case before us.

[44] In *Lim Hui Jin*, the freezing order was issued on 24 June 2014 (prior to the amendment), but the seizure order was issued on 11 September 2014 (after the amendment). The COA held that s 52A applies retrospectively in the sense that the seizure order expires on 24 June 2015, 12 months after the freezing order was issued.

[45] It is our finding that the facts of *Lim Hui Jin* are completely different and distinguishable from the facts in the case before us. In the present case, both the freezing order and seizure order were issued in 2013, *well before the amendment*. Therefore, we are of the view that *Lim Hui Jin* does not apply to the instant case.

The winding up order v seizure order

[46] The first defendant contended that the bank was merely complying with the winding up order when it released the money to the MDI. It was further argued that the plaintiff should have filed a proof of debt.

[47] We are of the view that the effect of a winding up order is to facilitate the distribution of the company's assets. However, the assets under forfeiture under AMLATFAPUA cannot be said to belong to the company until determined to the contrary.

[48] Section 53(3) of the AMLATFAPUA reads as follows:

> *Dealing with property after seizure to be void*
>
> [3] *for so long as a seizure of any property under this Act remains in force, no action, suit or other proceedings of a civil nature shall be instituted, or if if is pending immediately before such seizure, be maintained or continued in any court or before any other authority in respect of the property which has been seized, and no attachment, execution or other similar process shall be commenced*, or if any such process is pending immediately before such seizure, be maintained or continued, in respect of such property on account of any claim, judgment or decree, regardless whether such claim was made, or such judgment or decree was given, before or after such seizure was effected, except at the instance of the Federal Government or the Government of a State, or at the instance of a local authority or other statutory authority, or except with the prior consent in writing of the Public Prosecutor. (Emphasis added.)

[49] In the present case, the winding up petition against TS Steel commenced on 4 August 2014, following the issuance of the seizure order. As such, it is our finding that the winding up order is void ab initio for breaching s 54 of the AMLATFAPUA.

[50] Based on the above, we are of the view that a seizure order shall prevail over a winding up order because:

> 50.1 A winding up order is to enable liquidators to distribute assets that belong to the wound-up company for the benefit of the creditors and contributories. (See ss 475 and 489 of the Companies Act 2016.)
>
> 50.2 Whereas, a seizure order is issued to seize a property that is suspected to be illegal proceeds and pending forfeiture until released by the court. (See ss 55 and 56 of the AMLATFAPUA.)
>
> 50.3 As such, a seized property cannot be said to belong to the company and subject to distribution under a winding up order until released by the court back to the company.

[51] It is our finding that upon the issuance of the seizure order, the said sum no longer formed part of the assets of TS Steel and, as such, should not fall within the purview of the official receiver.

[52] We also find that the first defendant had been negligent when it failed to give any notice to the official receiver about the fact that the current account had been subject to a seizure order. The first defendant also did not consult

with or give notice to the second or third defendants about its decision and/or action to release the said sum to the MDI.

[53] On this issue, we find and agree with the findings of the learned JC when Her Ladyship held as follows:

> [54] The law, specifically s 54(3) of the AMLATFA is clear that for so long as the seizure order remained in force (and here the court holds it so as the forfeiture proceedings had commenced), no other action/suit/other civil proceedings shall be instituted or where it was pending before the seizure order, maintained or continued in respect of the said sum in the said account with the first defendant. *The winding up petition of TS Steel Sdn Bhd on 4 August 2014 was after the issuance of the seizure order and the commencement of the forfeiture proceedings. So, it did not prevail or override the legal actions under AMLATFA*.
>
> [55] *Evidence of the second defendant was that during his communication with the first defendant for the release of the said sum to the plaintiff, the first defendant did not inform him that the said sum was remitted to the Department of Insolvency. Neither did the first defendant informed him that the said sum had been released based on its belief that the seizure order had lapsed on the assumption or lack of knowledge of any forfeiture proceeding or any other action. The first defendant's contention of the applicability of s 52A had only arisen later when the plaintiff requested for the release of the said sum pursuant to the Court of Appeal order*.
>
> [56] *Evidence on the process and procedure of the remittance of the said sum to the Department of Insolvency as addressed in detail above apparently showed the first defendant's defence contending the retrospective application of s 52A is an afterthought. Evidence showed that although the seizure order was served, it was not abided to as the said current account was closed upon the notice of the winding up of TS Steel Sdn Bhd. Further, the said sum was remitted to the Department of Insolvency although the first defendant knew not just of the seizure order but the forfeiture proceedings.*
>
> [57] *The timeline stipulated above clearly also suggested the afterthought as the plaintiff had written directly to the first defendant in November 2018 and it was only towards the end of January 2019 that the latter confirmed the position. Nevertheless, it cannot be applicable.* (Emphasis added.)

Third-party application

[54] The first defendant argued that the plaintiff and the second defendant ought to have taken steps by giving notice to the first defendant of the third-party application and the forfeiture proceedings and conducting regular check-ups with the first defendant regarding the whereabouts of the said sum.

[55] It is the finding of this court that the first defendant was charged with the duties of administering the current account as long as the seizure order was still in force. Thus, the first defendant ought not to have released the said sum until the disposal of the third-party application.

[56] The first defendant, however, contended that they were not aware of the third-party proceeding filed in court, hence, the release of the money to the MDI.

[57] We find the excuse given by the first defendant to be completely untenable. The crux of the matter remains that the first defendant is not permitted to have dealt with the said sum in the current account while the seizure order was still in force. Therefore, it is immaterial that the first defendant had no knowledge of the third-party application in light of the seizure order.

[58] The first defendant's own witness admitted that the first defendant did not have the best SOP in ensuring the account had not been frozen, or was not under freezing or seizure order under the AMLATFAPUA when handling a winding-up company. (See record of appeal 2A, pp 228–229.)

[59] The first defendant also failed to produce any documentary evidence showing the existence of a SOP on how to deal with bank accounts that were subject to a freezing order/seizure order under AMLATFAPUA, while they produced a very comprehensive SOP for winding up. (See record of appeal 2B, pp 604–606.)

> VJK: Ok. Now, pada masa En Nasrol bertugas, adakah Hong Leong Bank ada satu dokumen standard procedure, standard, prosedur operasi standard, standard operating procedure, untuk kes di mana perintah pembekuan atau perintah seizure dikeluarkan mengikut Akta AMLA? Apakah prosedur yang wajib diikuti oleh pegawai bank yang mengendalikan akaun yang dibekukan atau yang disita? Adakah apa-apa SOP dikeluarkan oleh Hong Leong Bank?
>
> NASROL: SOP?
>
> VJK: Sepertimana dan untuk yang ini SOP untuk winding up, betul?
>
> NASROL: Betul.
>
> VJK: Yang kamu rujuk tadi –
>
> NASROL: Betul.
>
> VJK: 264, untuk winding up?
>
> NASROL: Betul.
>
> VJK: Ada apa-apa SOP lain untuk akaun di mana terlibat dalam AMLA? Anti-Money Laundering Act? Semasa Encik bertugas di Hong Leong Bank?
>
> NASROL: Saya tidak dapat nak pastikan yang –
>
> VJK: No, ingat atau tidak? Ada tahu atau tidak?
>
> NASROL: Tidak.
>
> VJK: Tidak tahu, ya? Atau –
>
> NASROL: Tak ingat.

VJK: Ok, tidak ingat. Dan En Nasrol setuju, ya, SOP yang En Nasrol rujuk, ya, boleh confirm, tidak ada apa-apa rujukan di dalam dokumen ini yang menkehendaki pegawai memastikan sama ada akaun tersebut dibekukan atau disita menurut peruntukan AMLA? Muka surat 264 hingga 266 yang kamu rujuk. Tidak ada apa-apa rujukan berkenaan peruntukan Akta AMLA, Anti-Money Laundering Act?

NASROL: Tidak.

(See record of appeal 2A, pp 210–212.)

[60] We find that it is rather appalling for the first defendant to take the position that the first defendant ought not to be held liable, as SD2 was not aware of the seizure order and freezing order when he released the said sum to the MDI. We are of the view that it is the duty of the first defendant to ensure that the said sum is kept in its safe custody until the disposal of the forfeiture proceeding.

[61] Crucially, we find that the first defendant failed to call the critical witnesses identified in the trial who would have been able to confirm whether the relevant maintenance was done to block access to the current account.

AH: Dan di dalam kes ini, En Nasrol tak nampak dalam system bahawa akaun tersebut telah dihalang untuk sebarang transaksi?

NASROL: Ok. Semasa saya menandatangani cek, ok, and semasa saya mendapat repot MC2125P, ok? Dan menandatangani cek kepada Ketua Pengarah Insolvensi, ok, pada masa itu akaun telah ditutup, ok. Diproses untuk penutupan oleh officer, current account officer, ok. Then jika akaun itu telah ditutup, saya tidak dapat melihat lagi apa-apa maintenance untuk menghalang apa-apa transaction di dalam akaun tersebut.

AH: So, dalam kes ini, En Nasrol, siapa pegawai tersebut? Current, untuk current account tersebut?

NASROL: Current account officer tersebut ialah En Zainizam.

AH: Saya tarik balik, Yang Arif. Dalam kes ini, siapa yang boleh sahkan bahawa dalam sistem tersebut, telah diadakan satu maintenance untuk menghalang transaksi ke atas akaun TS Steel?

NASROL: Jika perintah itu dikeluarkan pada tahun 2013, ok, means pegawai yang sepatutnya yang mungkin boleh memberi kenyataan ialah En Zainizam ataupun another officer, Ms Shaweeta.

(See record of appeal 2A, pp 87–88.)

[62] Thus, based on the above, we find that it is clear the first defendant did not have the proper mechanism to ensure the said sum was in its safe custody until the disposal of the third-party application.

Whether the first defendant breached the statutory duty

[63] It is to be noted that under the AMLATFAPUA, the duty imposed on financial institutions to hold seized funds by way of seizure order reflects Parliament's intention to safeguard both the Government's right to forfeit the money and the true owner and/or the bona fide third-party's right to claim back the seized funds.

[64] Therefore, it is our finding that the learned JC was right in holding that the plaintiff has a private right of action against the first defendant, a financial institution, for breaching its statutory duties under the AMLATFAPUA by unlawfully releasing seized funds, causing losses to the plaintiff.

[65] The first defendant contended that the plaintiff does not have a private law cause of action against the first defendant under the AMLATFAPUA. However, having perused the cause papers, we agree with the learned JC's finding that the first defendant failed to plead this as their defence.

[66] Further, we are of the opinion that a private law cause of action will arise if the statute intends to protect a limited class of the public for breach of such statutory duty, if the statute provides no other remedy for such a breach.

(See: *Tey Kian Meng v Sierra Residences (M) Sdn Bhd & Anor* [2024] MLJU 3124; [2024] CLJU 2631; [2024] AMEJ 2674.)

[67] Based on the mechanism provided under ss 50, 54, 55 and 56 relating to the seizure order and forfeiture proceedings under the AMLATFAPUA, we observed that:

67.1 AMLATFAPUA allows the public prosecutor to apply to the court to forfeit the assets suspected of arising from illegal activities under AMLATFAPUA.

67.2 At the same time, AMLATFAPUA recognizes the ownership right of any third party over the seized assets if such claim is proven bona fide. As such, it has made publication of a notice by the *Gazette* compulsory so that the rightful owner can come forward and make a claim.

67.3 As such, AMLATFAPUA is designed to balance the Government's right to forfeit the seized asset found to be illegally obtained and the owner's or a bona fide third party's right to reclaim the seized asset.

67.4 In that sense, mechanisms were provided to preserve the integrity of the seized assets pending determination by the Court, ie freezing order, seizure order and section 54.

67.5 This shows that the imposition of a duty on the financial institution to keep the money by way of seizure order is intended by the Parliament to protect the right of the Government to forfeit the money and the right of the true owner to claim back the money.

67.6 Following which, provisions were also made available to return the seized asset to the person from whom it was seized (s 56(3)) or to the bona fide third party (s 61(3)).

[68] Based on our observation, we find that there is no provision available to protect the first defendant from flouting the seizure order. Sections 50(2) and 77 of the AMLATFAPUA only provide for protection to the first defendant from any claim arising from duly executing the seizure order.

[69] Given the aforesaid, it is clear that the AMLATFAPUA has catered for mechanisms to preserve the seized asset pending determination by the court of who the rightful owner is over the seized asset, ie either the Government by way of forfeiture or the third party by way of a bona fide claim. The preservative mechanisms are designed to protect both the Government and third parties.

[70] Since the plaintiff is found to be the rightful owner of the said sum pursuant to the COA order dated 10 October 2018, we are of the considered view that the first defendant, having released the said sum despite the seizure order, is liable to pay the sum to the plaintiff as damages for breach of statutory duty.

Issue of costs

[71] The first defendant contended that the costs of RM300,000 ordered to be paid by them to the plaintiff on a solicitor and client basis is punitive in nature, as the first defendant was not involved in the third-party application.

[72] The learned JC in para 66(3) of her grounds of judgment had given her reasons why the costs of RM300,000 was awarded based on a client and solicitor basis when Her Ladyship held as follows:

(3) *Costs on client and solicitor basis* — here this court orders the cost of *RM300.000* requested by the plaintiff as the proceedings *to recover the said sum from the said current account was initiated back in 2014 and had involved in appeals to the Court of Appeal in two instances including trials at the bona fide third-party application as well as this one*. (Emphasis added.)

[73] Having perused the evidence produced before us and having considered the subject matter and proceedings involved in the High Court and the COA previously, we agree with the learned JC's reasoning and the submission of the plaintiff that the costs of RM300,000 is a fair and reasonable figure having regard to the fact that:

73.1 The plaintiff had gone through an order 14A proceedings in the High Court, then went up on appeal to the COA, and then had to go back to the High Court for a full trial and submissions.

73.2 The third-party application was filed for the purpose of claiming the said sum in the current account, which is supposed to be preserved by the first defendant at all material times.

73.3 Due to the first defendant's breach, the COA order obtained from the third-party application cannot be enforced at all.

73.4 Consequently, the plaintiff had to initiate another action in court and went through another trial in order to ventilate their rights and espouse their claim before it could obtain the requisite sum.

73.5 This matter in its entirety had taken up a great deal of time and also entailed much getting up since 2014.

73.6 Ultimately it is the plaintiff who have suffered substantial losses because of what the first defendant did, and had to go great lengths to seek legal recourse and it is only fair that the first defendant be made to pay a higher set of costs.

Whether there was negligence by the second and third defendants

[74] Based on our findings above regarding the first defendant, we conclude and agree that the second and third defendants were not negligent in the instant case.

[75] We find no appealable error or misdirection on the part of the learned JC in her finding that the second and third defendants are not negligence when Her Ladyship had stated in paras 62–65 of her grounds of judgment as follows:

Liability of the second and third defendants — Whether there was negligence by the second and third defendants

[62] Once the seizure order was issued, the first defendant was not to deal with the moneys until the seizure order was varied or revoked. More so when the forfeiture proceedings commenced where the first defendant's confirmation as to the final figure in the said current account was obtained for the purposes of the forfeiture proceedings. All this was before the release of the moneys including the said sum from the said current account to the Department of Insolvency.

[63] Therefore, *the confirmation by the second defendant for the third defendant that the said sum was still in the said account during the trial/hearing of the forfeiture proceedings and the appeals at the Court of Appeal was based on the representation made by the first defendant on the final figure for the commencement of the forfeiture proceedings*. The said representation was relied upon when the second defendant testified in the forfeiture proceedings which was a few months later to the time when the representation was made.

[64] *Following the Court of Appeal's decision in October 2018, the second defendant on behalf of the third defendant had directed for the first defendant to release the said sum to the plaintiff. There was no evidence of bad faith or negligence on the part of the second and third defendants in any of their actions*.

[65] *Assessing the testimony of the second defendant at trial and all the evidence adduced, this court found that there was no negligence in his conduct of executing his*

duties as the investigating officer for the third defendant. There were also no breaches of statutory duty by him and the third defendant. Accordingly, the action against the fourth defendant cannot be sustained. This court dismissed the plaintiff's suit against the second to the fourth defendants. (Emphasis added.)

Appeal 166

[76] The plaintiff appeals against the decision of the learned JC in respect of part of her decision that:

(a) the 5% interest on the said sum, which is to be paid by the first defendant to the plaintiff, is to be calculated from 10 October 2018, ie, the date of the COA in Appeal 239, until full settlement; and

(b) the plaintiff's claim against the second to fourth defendants is dismissed.

[77] Based on our findings above that the second and third defendants are not negligent, we find that the plaintiff's appeal on this issue has no merit and therefore is dismissed.

[78] With regards to the issue of the date of the commencement of the judgment interest, the plaintiff complained that the learned JC should have calculated the interest on the claim sum from 14 May 2015, which is the date of the High Court 14A order, instead of 10 October 2018.

[79] The learned JC had stated in para 66(2) of Her Ladyship's grounds of judgment on why the interest rate should be calculated from the COA order dated 10 October 2018, as follows:

(2) Interest at 5%pa on the said sum to be *calculated from 10 October 2018 until full settlement. This is premised on the date of the Court of Appeal's order that confirmed the said sum belonged to the plaintiff.* (Emphasis added.)

[80] We are of the view that the learned JC was not plainly wrong in her decision to make such an order, as it was made based on a final COA order dated 10 October 2018. Therefore, we do not think that this issue warrants an appellate intervention.

[81] On the issue of whether the first defendant ought to indemnify the plaintiff for the cost payable to the second to fourth defendants, we find that the first defendant did not commence the present suit in the High Court against the second to fourth defendants. It was the plaintiff who decided as to who to be named as the defendant. Therefore, we are of the view that the plaintiff ought to bear the consequence, ie, the costs itself, in light of our earlier finding that the plaintiff's action against the second to fourth defendants fails.

A CONCLUSION

[82] For the foregoing reasons, we find both Appeals 143 and 166 unmeritorious and are accordingly dismissed. The decision of the High Court is hereby, affirmed.

B

[83] We further order that for Appeal 143, the first defendant to pay costs of RM30,000 to the plaintiff, subject to allocator and to the second to fourth defendants RM20,000 without the allocator.

C

[84] For Appeal 166, we order the plaintiff to pay costs of RM10,000 to the first defendant, subject to allocator and RM30,000 to the second to fourth defendants without the allocator.

D *Appeals unanimously dismissed and High Court's decision affirmed.*

Reported by Ashok Kumar

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